

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7373

Joint Petition of Vermont Electric Power Company, Inc.,)
Vermont Transco, LLC, and Central Vermont Public)
Service Corporation for a certificate of public good,)
pursuant to 30 V.S.A. Section 248, authorizing the)
construction of the Southern Loop Transmission)
Upgrade Project)

Order entered: 9/18/2008

PROCEDURAL ORDER RE: MOTIONS FOR ENLARGEMENT OF TIME TO FILE TESTIMONY

Various parties have filed motions for the enlargement of time to submit prefiled testimony in this docket in recent weeks. In this Order, the Public Service Board ("Board") addresses these motions.

In the case of two of these requests, no opposition was filed with the Board from any party. On September 2, 2008, the Vermont Division for Historic Preservation ("Division") requested an enlargement of time until September 4 to file the testimony of R. Scott Dillon, as a result of his unusually heavy work load. Mr. Dillon's testimony, which was due on September 2, was subsequently filed on September 4. Also on September 2, the Vermont Department of Public Service ("Department") requested an enlargement of time until September 5 to file the testimony of David Raphael due to a medical issue. Mr. Raphael's testimony, which was due on September 2, was subsequently filed on September 3. Given the absence of any opposition to either of these requests, the Board grants the motions for enlargement of both the Division and the Department and concludes, accordingly, that the rebuttal testimonies of Mr. Dillon and Mr. Raphael were timely filed.

On August 26, 2008, Carl Ferenbach and Judy W. Ferenbach (collectively, the "Ferenbachs") filed a motion to enlarge the time for submitting additional prefiled testimony ("Ferenbach Motion"). The Ferenbachs sought to extend the deadline for submitting prefiled

rebuttal testimony concerning the environmental impacts of construction activity until at least September 17, 2008.¹

The Ferenbachs contend that Vermont Electric Power Company, Inc., Vermont Transco, LLC, and Central Vermont Public Service Corporation (collectively, the "Petitioners") failed to inform them about certain road construction and related activity in the environs of the Ferenbachs' property until the Petitioners' responses to the Ferenbachs' third set of information requests filed on August 18, 2008. They also contend that the information included in this delayed disclosure is of critical importance to the preparation of the prefiled testimony of the Ferenbachs. The Ferenbachs did prefile rebuttal testimony on September 2, 2008, but included a notice of prejudice noting the prejudice to the analysis of several Ferenbach witnesses caused by the failure of the Petitioners to previously disclose "extensive activity in and around significant natural communities and also wetlands . . . , including the construction of a 'temporary' access road . . . along the edge of wetland T15."

The Vermont Land Trust filed a reply in support of the Ferenbach Motion on August 28, 2008. The Vermont Land Trust asserted that the new information provided by the Petitioners in response to the Ferenbachs' third round of discovery requests "reveals intrusions into the wetland on the Ferenbach property that the parties have not been able to consider and evaluate up to this point."

The Petitioners oppose the Ferenbach Motion. In their opposition filed on August 29, 2008, the Petitioners argue that the Ferenbach motion should be denied because: (1) it is untimely and fails to show good cause for the delay; (2) it would, if granted, deprive Petitioners of their due process rights to receive a fair and adequate opportunity to respond to and present evidence on all issues before the Board; and (3) it fails to comply with the minimum standards for pleadings under V.R.C.P. 7(b)(1) and Board Rule 2.206.

1. The Ferenbachs moved to enlarge the time until the later of "September 17, 2008, or 15 days after the Petitioners provide CAD data material regarding" Attachment AFER:PET.Reg.3-50-1 and Attachment AFER:PET.Reg.3-51. The Ferenbachs claim they require the CAD data from which Attachment AFER:PET.Reg.3-51 was drawn "to determine the exact terminus of the proposed intrusion." Ferenbach Motion at 4-5. It is not clear from the Ferenbach Motion, or their subsequent Notice of Prejudice, as to when the Ferenbachs made a request for such CAD data and what the current status of that request is.

After a review of Attachment AFER:PET.Req.3-50-1 (CUD-5) and Attachment AFER:PET.Req.3-51, it appears such attachments disclose proposed access routes that intrude into or near the delineated wetland (T15). Attachment AFER:PET.Req.3-51 contains a drawing superimposed on an aerial photograph of the property which indicates one proposed access route (together with temporary wetland fill mats) intruding into the delineated wetland from near proposed utility pole 188 and another proposed access route going into the wetland buffer to the edge of the delineated wetland south of proposed utility pole 189 (which is anticipated to cause a temporary disturbance to the wetland buffer). It does not appear that these specific access routes, intrusions, disturbances and control measures were previously disclosed in discovery.

We note that these proposed access routes are not shown on the Southern Loop Project Plans that were filed by Petitioners with their original petition on November 8, 2007, and their prefiled testimony.² Petitioners point out that the Ferenbachs have been in possession of a draft Erosion Prevention and Sediment Control ("EPSC") plan for their property, which was included in Attachment AFER:PET.Int.-8.Supp.1 and filed with the Board in April. However, the draft EPSC plan for the Ferenbach parcels in Attachment AFER:PET.Int.-8.Supp.1 does not disclose the proposed access routes beyond proposed utility pole 188 that are detailed in Attachment AFER:PET.Req.3-50-1 (CUD-5) and Attachment AFER:PET.Req.3-51, which were first filed by the Petitioners on August 18. Petitioners also note that a complete Conditional Use Determination ("CUD") application was filed with the Vermont Agency of Natural Resources on May 13, 2008, and was publically available for the Ferenbachs to inspect. However, the public availability of these records would not excuse a failure to provide such information earlier in response to discovery requests for related information.

Accordingly, we find that the request for delay sought in the Ferenbach Motion has merit. At the same time, we note that the Ferenbachs did prefile rebuttal testimony on September 2. It is not entirely clear, despite the Notice of Prejudice, whether the Ferenbachs believe they were able to address adequately in the prefiled rebuttal testimony any issues that arose as a result of the new information included in the discovery responses of the Petitioners on August 18. Because it

2. See Petitioners' Exhibit SD-2 accompanying prefiled testimony of Steven P. Damiano (sheet number 22 of Volume VI of the Exhibit Binder).

is possible some of these issues were not addressed as fully as would have been the case with an enlargement of time, we will provide an opportunity for the Ferenbachs to supplement the testimony as it relates to information included in Attachment AFER:PET.Req.3-50-1 (CUD-5) and Attachment AFER:PET.Req.3-51, provided any such supplemental testimony is filed by September 24, 2008.

We recognize the timing concerns the Petitioners raise in their opposition. We will take further action, as necessary and subject to the advice of the parties, if the Ferenbachs submit supplemental testimony under this Procedural Order, to ensure that the Petitioners receive a fair and adequate opportunity to respond to and present evidence on any issues that arise from any supplemental testimony submitted by the Ferenbachs. We will also seek to avoid any delay in the timing of the technical hearings (which will begin on October 15, but will continue through November 10 under the schedule established by our Prehearing Conference Memorandum and Schedule Order of December 26, 2007).

We share some of the concerns raised by Petitioners about the presentation of the Ferenbach Motion in terms of the requirements of the V.R.C.P. and Board rules, and remind the Ferenbachs and other parties of their obligations in this regard. However, we do not find the pleading deficiencies in the motion to be sufficient to deny the relief requested because the rationale and legal basis behind the Ferenbach Motion can be ascertained, relatively easily, from the contents of the motion.

SO ORDERED.

Dated at Montpelier, Vermont, this 18th day of September, 2008.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: September 18, 2008

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)